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on Civil and Political Rights**

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HUMAN RIGHTS COMMITTEE
Fifty-first session

VIEWS

Communication No. 484/1991

Submitted by: H.J. Pepels [represented by counsel]

Victim: The author

State party: The Netherlands

Date of communication: 25 November 1991 (initial submission)

Documentation references: Prior decisions

- Special Rapporteur's rule 91 decision, transmitted to the State party on 23 January 1992 (not issued in document form)
- CCPR/C/47/D/484/1991 (Decision on admissibility, dated 19 March 1993)

Date of adoption of Views: 15 July 1994

On 15 July 1994, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 484/1991. The text of the Views is appended to the present document.

[Annex]

^{*}/ Made public by decision of the Human Rights Committee.
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ANNEX

**Views of the Human Rights Committee under article 5, paragraph 4,
of the Optional Protocol to the International Covenant
on Civil and Political Rights
- Fifty-first session -**

concerning

Communication No. 484/1991

Submitted by: H.J. Pepels [represented by counsel]

Victim: The author

State party: The Netherlands

Date of communication: 25 November 1991

Date of decision on admissibility: 19 March 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 1994,

Having concluded its consideration of communication No. 484/1991 submitted to the Human Rights Committee by Mr. H.J. Pepels under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is H.J. Pepels, a Netherlands citizen, residing in Stein, the Netherlands. He claims to be a victim of a violation by the Netherlands of article 26 in conjunction with articles 3 and 5 of the Covenant. He is represented by counsel.

The facts as presented:

2.1 The author became a widower on 12 July 1978 and had to assume sole responsibility for the upbringing of his four young children. The Algemene Weduwen- en Wezenwet (AWW) (General Widows' and Orphans' Act) only provided for benefits to widows who fulfilled certain requirements. Widows with unmarried children living at home would qualify for the benefits, which were not dependent on income. Widowers, however, were not entitled to benefits under the AWW. Faced with this situation, the author did not apply for benefits.

2.2 Ten years later, on 7 December 1988, the Centrale Raad van Beroep (CRvB) (Central Board of Appeal), the highest court in social security cases, decided that, despite the text of the law, widowers were also entitled to AWW-benefits, since the legal provisions were considered to be in violation of the principle of non-discrimination.

2.3 The author then applied for AWW-benefits. On 14 March 1989, he was informed that an AWW-benefit would be granted to him as of 1 December 1987, pursuant to article 25(3) of the law, which provides for the retroactive grant of benefits for a period of up to one year preceding the date of application. The author appealed the decision to grant him benefits as of 1 December 1987, claiming that special circumstances existed within the meaning of article 25(5) of the AWW. Article 25(5) of the AWW provides that if special circumstances exist, retroactive benefits can be granted for a longer period. The Raad van Beroep (Board of Appeal), on 30 March 1990, agreed that special circumstances should be taken into account and that the author should be granted retroactive benefits. The Sociale Verzekeringsbank (SVB), the body responsible for implementing the AWW, then appealed this decision to the CRvB.

2.4 On 31 January 1991, the CRvB decided that, although the AWW was inconsistent with article 26 of the Covenant (which entered into force for the Netherlands on 11 March 1979) benefits could be granted to widowers only as of 23 December 1984, the ultimate date established by the Third Directive of the European Community (EC) for the elimination of discrimination between men and women within the community. As regards the retroactivity of benefits, the CRvB considered that unfamiliarity with rights could be a factor in deciding whether special circumstances existed to extend the retroactivity for a period longer than a year. It added, however, that it could agree to a policy that would restrict the extra retroactivity to cases of specifically serious character.

2.5 On the basis of the CRvB's decision, the SVB decided not to change the date (1 December 1987) as of which AWW benefits would be granted to the author. The author's further appeal against this decision was dismissed by the Maastricht District Court.

The complaint:

3.1 The author claims that the decision not to grant him full retroactive benefits violates article 26 juncto articles 3 and 5 of the Covenant.

3.2 It is submitted that the date of 23 December 1984 is arbitrary, since only chosen for practical reasons. AWW-benefits are not covered by the Third EC Directive, which prescribes the abolition of all discrimination between men and women as of 23 December 1984. The author further submits that there is no legal ground for a transitional period in the direct applicability of article 26 of the Covenant. He states that the thirteen years between 1966 (when the State party signed the Covenant) and 1979 (when the Covenant entered into force for the State party) should have been sufficient for the government to adjust its legislation. He submits that a gradual implementation of treaty regulations on non-discrimination is only relevant as far as article 2(2) of the International Covenant on Economic, Social and Cultural Rights is concerned, but that the application of article 26 of the International Covenant on Civil and Political Rights is not similarly restricted. He notes moreover that already in 1973, the Nederlandse Gezinsraad (Dutch Family Council), an official advisory body to the Government, recommended the granting of benefits under the AWW to widowers.

3.3 In this context, the author refers to the Views of the Human Rights Committee in case No. 172/1984 (Broeks v. The Netherlands)¹. He also refers to a Government memorandum regarding the entry into force of the Covenant, in which the Government stated unequivocally that there was no reason to deny direct applicability of part III of the Covenant. Furthermore, the author states that article 26 of the Covenant is reflected in the Netherlands constitution, which prohibits discrimination on the ground of inter alia, gender.

3.4 The author states that article 26 of the Covenant is directly applicable in the Netherlands as of 11 March 1979, and that the refusal of AWW benefits to widowers violates this article as of that date.

The Committee's admissibility decision:

4. At its forty-seventh session, the Committee considered the admissibility of the communication. It noted that the State party had confirmed that all domestic remedies had been exhausted and that it had raised no other objections to admissibility. On 19 March 1993, the Committee declared the communication admissible in so far as it might raise issues under article 26 of the Covenant.

The State party's observations on the merits and the author's comments thereon:

5.1 By submission, dated 24 February 1994, the State party explains that the award of pensions to widows alone and not to widowers derived from the fact that, in 1959, when the AWW was enacted, the prevailing norm in society at large was that the husband was the breadwinner while the wife was responsible for running the household and taking care of the children. According to the State party, there was therefore no reason for the scheme to cover widowers too, as it was assumed that a widower would be able to earn his own living. In the

¹ Views adopted on 9 April 1987.

opinion of the State party, the principle of equality embodied in article 26 of the Covenant was therefore not being violated, because the different treatment could be justified on objective and reasonable grounds.

5.2 The State party acknowledges that social realities have changed and that the different treatment between widows and widowers can no longer be justified in present-day society. It submits that it has decided to introduce new legislation to replace the existing AWW, regulating pension entitlements for both widows and widowers. The State party, however, contends that one cannot apply the present standards with respect to article 26 of the Covenant to past facts and circumstances, when other social realities were relevant. It argues that past facts and events should be judged in the light of the social reality at that time.

5.3 The State party submits that the CRvB's decision that article 26 of the Covenant had to be complied with as from 23 December 1984, and that benefits could not be granted retroactively for a period prior to that date, is reasonable. It argues that social security legislation makes distinctions between different categories of persons in order to achieve social justice. Since social trends develop gradually, the realisation that pension entitlements can no longer be restricted to widows also took place gradually. Since the legislation necessarily lags behind social developments in society, the State party argues that it is reasonable to allow for a certain amount of time to adjust legislation and practice before concluding that they are in violation of the Covenant. In this context, the State party refers to the Committee's decision in communication No. 501/1992² and to the individual opinion of three members of the Committee in the Committee's Views with regard to communication No. 395/1990³.

5.4 The State party submits that it regularly reviews its social security legislation in the light of changes in social attitudes and structures. It refers to its decision to introduce new legislation abolishing the legal distinction between widows and widowers with regard to pensions, and states that pending enactment of the bill, equal treatment is at present accorded to widows and widowers on the basis of case law.

6.1 In his comments, dated 12 April 1994, the author argues that, even if in 1959 social reality was such that there was no reason to apply the AWW to widowers, in 1979 this situation had already changed. The author refers to his initial communication and quotes from a 1973 report of the Family Council, where the extension of the applicability of the AWW to widowers was recommended on an urgent basis. According to the author, there was therefore no longer a valid reason in 1979, when the Covenant entered into force for the Netherlands, to distinguish between widows and widowers in violation of article 26 of the Covenant. In this context, the author refers to the prior jurisprudence of the Committee in which the Committee held that equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria. He argues that, with regard to pensions for widows and widowers, the distinction between men and women in 1979 was no longer based on reasonable and objective criteria.

6.2 The author further argues that, during the process of ratification of the Covenant, the Government informed Parliament that the rights protected in the Covenant would have direct

² J.H.W. v. The Netherlands declared inadmissible on 16 July 1993.

³ M.T. Sprenger v. The Netherlands Views adopted on 31 March 1992.

⁴ See inter alia the Committee's Views with regard to communication No. 395/1990 M.T. Sprenger v. The Netherlands, Views adopted on 31 March 1992, paragraph 7.2.

applicability in the Netherlands, in the sense that they could directly be invoked before the courts. The author further notes that the Government explained that the long period between signing the Covenant and ratifying it, had been necessary to bring the legislation and existing practice in conformity with the provisions of the Covenant. On this basis, the author argues that the State party now is estopped from claiming that it needed an additional period of time to adjust its social security legislation in order to bring it in line with the Covenant. In this context, the author reiterates that the date of 23 December 1984 is irrelevant for the determination of direct applicability of Covenant rights in the Netherlands.

Issues and proceedings before the Committee:

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee refers to its earlier jurisprudence and recalls that, while article 26 requires that discrimination be prohibited by law and that all persons be guaranteed equal protection against discrimination, it does not concern itself with which matters may be regulated by law. Thus, article 26 does not of itself require States parties either to provide social security benefits or to provide them retroactively in respect of the date of application. However, when such benefits are regulated by law, then such law must comply with article 26 of the Covenant.

7.3 The Committee notes that, while the law in question makes a distinction between widows and widowers, this distinction has been inoperative since 7 December 1988, when the CRvB found it unreasonable and in violation of the principle of equality. In other words, the distinction no longer applied when Mr. Pepels requested benefits under the AWW on 14 December 1988 and was granted benefits, retroactively, as from 1 December 1987.

7.4 Mr. Pepels claims that the law in question, as applied prior to the decision of the CRvB, was inconsistent with article 26 of the Covenant. However, he did not attempt to challenge the law at the material time by claiming AWW benefits, as he now indicates would have been open to him, *inter alia* by virtue of article 26 of the Covenant. Thus, the contested provisions of the law were never applied in his particular case. In the circumstances, the Committee has no grounds to pronounce itself on the author's retroactive claim for the period between 11 March 1979 and 1 December 1987.

7.5 The Committee observes that since December 1988 AWW benefits are granted to widows and widowers alike. The Act provides for the grant of retroactive benefits for up to one year preceding the date of application; only in exceptional circumstances can benefits be granted as from an earlier date. This provision is being applied to men and women alike, and the information before the Committee does not show that Mr. Pepels was treated differently than others. The Committee, therefore, concludes that the way in which the law is applied since 1988 does not reveal a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by the State party of any of the articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]